

Providing Information versus Writing Bid Specifications and Contract Terms

Purpose:

This instruction sets forth the policy to inform sponsors of the Child Nutrition Programs of their responsibility in complying with the statutory and regulatory provisions of Part 3016.60.

Scope:

Sponsors participating in the School Breakfast Program (SBP), National School Lunch Program (NSLP), Child and Adult Care Food Program (CACFP), and the Summer Food Service Program (SFSP).

Description:

USDA asked that State agencies share the attached questions and answers with Child Nutrition Program Sponsors and, as requested by USDA, we are encouraging Sponsors to share this information with their legal counsel. The point USDA wants to emphasize through this policy is that the Sponsor, not the potential contractor, is responsible for complying with statutory and regulatory provisions regarding writing bid specifications and contract terms.

Question 1: How did regulations 7 CFR Parts 3016 and 3019 change the procurement procedures for public and nonprofit SFAs?

Answer: The Part 3016 regulation implements the concept of Federalism for public SFAs administering the child nutrition programs. Pursuant to Part 3016.36(b), public SFAs will use their own procurement procedures that reflect applicable State and local laws and regulations, as long as those procedures are consistent with the requirements found at §3016.36(b) through (i) and §3016.60(b) through (c). An SFA may establish any procurement or contract procedure or requirement that is within its authority to establish, so long as the procedures and requirements are consistent with §3016.36(b-i) and §3016.60(b-c). A nonprofit SFA may elect to follow the procurement procedures at §3019.40-.48 or use its own organizational procedures as long as those procedures are consistent with the requirements of Part 3019.

Question 2: Please explain §3016.36(b-i) and §3016.60(b-c).

Answer: 7 CFR Part 3016.36(b-i) establishes the minimum standards an SFA must follow to conduct a proper procurement. These standards address such elements as the requirement that an SFA have a written code of conduct governing the performance of employees engaged in the award and administration of contracts (§3016.36(b)(3)); methods of procurement (§3016.36(d)); the requirement that the SFA perform a cost or price analysis for every procurement, including contract modifications (§3016.36(f)); and required contract clauses and certifications (§3016.36(i)). For additional information, please consult regulation 7 Part 3016. The requirement at §3016.60(b), allows an SFA to award a contract to a potential contractor

that provided information to the SFA that the SFA used in its drafting of specifications, bid, proposal or contract terms, but prohibits the award of a contract to a potential contractor when the potential contractor actually drafted the specifications, bid, proposal, procurement or contract terms. The SFA alone is responsible for developing the documents used in conducting its procurements. 7 CFR Part 3016.60(c) prohibits the use of in-State and local geographic preferences in the award of contracts.

Question 3: Does regulation 3019 contain the same requirements and prohibitions for nonprofit SFAs?

Answer: The minimum standards (§3019.40-.48) nonprofit SFAs must follow in conducting procurements are generally the same as those that apply to public SFAs. While a nonprofit SFA cannot award a contract using an in-State or local geographic preference, Part 3019 does not contain a corresponding prohibition to §3016.60(c). The specific prohibition is not necessary in Part 3019 because nonprofit SFAs lack the legal standing to establish in-state or local geographic preferences. Nonprofit SFAs have been prohibited from awarding contracts to potential contractors that drafted procurement documents since the mid-1970s. That prohibition is stated at §3019.43.

Question 4: Do the specific procurement and contract clause requirements of the Program regulations still apply?

Answer: Yes. For example, the Part 210.16 requirements regarding the 21-day cycle menu requirement (§210.16(a) (1)), specific clauses at §210.16(c) and duration of contracts (§210.16(d)) still apply to food service management company (FSMC) procurements and contracts.

Question 5: Does applying Parts 3016 and 3019 to SFA procurements change FNS' position on the crediting of discounts and rebates in cost reimbursable contracts?

Answer: No. FNS' position on this subject remains unchanged. FNS strongly encourages, but does not require, that all cost reimbursable contracts include provisions to ensure SFAs are only charged net, allowable costs. The Office of Management and Budget and the Department's Office of the General Counsel have made clear that SAs and SFAs can impose compliance with net cost requirements through contractual terms.

Question 6: Does Federalism prevent the SA from establishing procurement and contract requirements that SFAs must follow?

Answer: No. Consistent with the "flow down" concept of Federalism, a SA may establish procurement and contract requirements that SFAs must follow, as long as those requirements are not inconsistent with Program requirements.

Question 7: Can an SFA follow the procurement procedures at §3016.36(b-i) instead of its own State and local requirements?

Answer: No, an SFA cannot substitute §3016.36(b-i) for more restrictive State or local requirements.

Question 8: Whom should a SA contact to obtain information about the procurement requirements that apply to public SFAs?

Answer: SAs should seek guidance from their State procurement officials and legal counsel or the chief State legal official.

Question 9: If State law exempts public schools from complying with State bid laws, is the SFA exempt from all procurement requirements?

Answer: No. The SFA would still be required to comply with local procurement requirements, any applicable Program requirements and the provisions of §3016.36(b-i) and §3016.60(b-c).

Question 10: Are there any actions a SA must take when it determines its SFAs must follow §3016.36(b-i) because there are no State or local procurement requirements applicable to SFA procurements?

Answer: Yes. In the committee report language accompanying Public Law 105-336, the William F. Goodling Child Nutrition Reauthorization Act of 1998, Congress informed USDA that it “should be prepared to promptly and fully account to the Committees of jurisdiction for each instance in which federal authorities address a matter of a subgrantee procurement.” As a result, FNS is requesting the SA provide written confirmation from the chief State legal official that the State’s public SFAs must follow §3016.36(b-i) because no applicable State or local requirements apply to its public schools.

Question 11: If questions or disputes arise concerning a public SFA’s procurement practices or contracts, do we still contact FNS for guidance?

Answer: No. These issues include contract management and compliance matters such as questions related to source evaluations, protests, disputes and claims. FNS will not substitute its judgment for that of the SA or SFA on these issues unless the matter is primarily a Federal concern. FNS will, however, take the necessary steps to assure compliance with the procurement requirements contained in §3016.36(b-i); §3016.60(b-c); §3019.40-48 and the school nutrition program regulations. Since disputes may result from the application of State and local laws, regulations and policies, we recommend both SAs and SFAs direct these disputes to appropriate State procurement and legal officials and the SFA’s own local legal counsel. This includes any dispute arising from the SA’s decision requiring SFA compliance with one or more of the procurement procedures contained at §3016.36(b-i) and any decision by a SA or SFA to expand the procurement procedures at §3016.36(b-i).

Question 12: Doesn’t the Federalism concept result in differences between States regarding procurement procedures and contract requirements and even between SFAs within the same State?

Answer: While procedural practices may differ, the fundamental requirements do not. Most public SFAs already operate under requirements that recognize the procurement principles incorporated in Part 3016, such as the requirement for full and open competition and the prohibition against conflicts of interest. To the extent procurement requirements do not exist or are less restrictive than those contained in Part 3016, the common rule requirements continue to apply. In addition, as noted above, all school nutrition program regulations applicable to procurement and contract management, such as the requirement that federally donated commodities accrue only to the benefit of the school food service (7 CFR 210.16(a)(6)) and the Buy American requirement (7 CFR 210.21(d)), continue in effect. With respect to all contracts, including those with FSMCs, SFAs are free to include procurement and

contract management requirements in their contract with these companies. FNS strongly encourages SFAs include, in all solicitations and contracts, terms that protect the nutritional and financial integrity of the school nutrition programs. Such terms may include requirements in cost reimbursable contracts that FSMCs, distributors and brokers obtain goods for the programs through competitive procurements and that all discounts, credits and rebates received by these contractors must be credited to the SFA's nonprofit school food service. Further, FNS encourages SAs develop prototype procurement and contract documents as a means of providing technical assistance to SFAs. FNS is currently considering proposing regulations to ensure greater consistency with respect to the participation of FSMCs and other cost reimbursable contractors in the school nutrition programs. Thus, although the Federalism principles incorporated in Part 3016 do provide greater flexibility and may result in some procedural variations between States and among public SFAs within a State, such as different small purchase thresholds; the basic requirements for sound procurement and contract management remain in place and will continue to be consistently applied. FNS will fully support SAs and public SFAs that exercise sound administrative practices and good business judgment in establishing procurement practices and contract terms that protect the integrity of the school nutrition programs.

SOURCE: USDA MEMORANDUM, DATED JULY 30, 2004.